No. 2836

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation.

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.

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STATEMENT OF CASE

This case comes before this court upon a writ of error to the United States District Court for the Eastern District of Washington, Northern Division, from a judgment in favor of the United States against the Great Northern Railway Company, imposing a penalty of twelve hundred dollars ($1200). The action was brought upon twelve counts, to recover penalties under the Safety Appliance statutes. The defendant demurred to the plaintiff's complaint. This demurrer was sustained by Judge Rudkin, whereupon a writ of

error was taken to the Circuit Court of Appeals of the Ninth Circuit, the judgment of dismissal entered upon the demurrer was reversed by a divided court, and the case sent back for further proceedings. (*U. S. vs. G. N. Ry. Co.*, 229 *Fed.* 929). Defendant thereupon answered and the plaintiff moved for judgment on the pleadings. Judge Rudkin granted the motion and judgment was entered for the plaintiff in the sum of twelve hundred dollars ($1200) with costs and disbursements. From this judgment the Great Northern Railway Company has sued out a writ of error.

STATEMENT OF FACTS

The facts are to be gathered from the complaint and answer. All the facts inconsistent with the answer, must be resolved in favor of the defendant railway company as not established.

The complaint consisted of twelve causes of action, and related to the movement of twelve trains during July, 1914, it being alleged that these trains were moved in violation of the Safety Appliance Act. The facts admitted in the answer and which are not disputed, show that defendant was engaged in interstate commerce at the time of the movement of the trains in question, and that the trains were moved in such commerce. The plaintiff by the motion for judgment on the pleadings, admitted that paragraph 3 of the answer was true. This paragraph establishes that "each engine upon each of said trains was equipped with

power driving wheel brakes and appliances for operating a train brake system, and that in each train not less then 85% of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes." (Tr. p. 17).

The defendant denied that it had violated the Safety Appliance Act. The allegations of the complainant that the defendant required the brakemen to use the common hand brake to control the speed of the train, and that the speed of the train was not controlled by the power or train brakes used and operated by the engineer of the locomotive drawing said train, are inconsistent with the allegation of paragraph 3 of the answer, and consequently must be taken as not proven.

ASSIGNMENT OF ERRORS

The following errors specified as relied upon, and each of which is asserted in this brief and intended to be urged, are the same as those set out in the assignment of errors appearing in the printed record.

1. That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in overruling the objection of the defendant to the granting of plaintiff's motion upon the pleadings.

2. That the said Court erred in granting the motion of the plaintiff for judgment in favor of the plaintiff upon the pleadings.

3. That said Court erred in finding that the defendant was guilty of a violation of the Act of Congress known as the "Safety Appliance Act," approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), which Act is entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in Interstate Commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes."

4. That said Court erred in ordering judgment to be entered herein and imposing a fine of one hundred dollars upon each cause of action, and twelve hundred dollars in all upon said defendant.

5. That said Court erred in rendering judgment herein in favor of the plaintiff and against the defendant for the sum of twelve hundred dollars, and the plaintiff's costs and disbursements herein. (Tr. p. 26).

QUESTION INVOLVED

The sole question involved is whether the Railway Company, after equipping its trains as required by the Safety Appliance Act and using and operating the power or train brakes to control the speed thereof, could use the hand brakes in connection with the power or train brakes.

The defendant in the court below objected to the granting of the motion for judgment on the pleadings, on the grounds that no cause of action was shown under the Act of Congress known as the Safety Appliance Act, its amendments, and the regulations promulgated in pursuance thereof; that to allow a recovery would deprive the defendant of its property without due process of law, and would be contrary to the provisions of Article 5 and Section 1 of Article 14 of the Amendments to the Constitution, of the United States, and would deny the defendant the equal protection of the laws, contrary to Section 1 of Article 14, of the Amendments; that it was shown that the defendant had fully equipped its locomotives and cars, and that the statutes and order of the Commission did not prohibit the use of hand brakes for the purpose of controlling the speed of trains; that the complaint did not charge a violation of the Safety Appliance Act or order of the Interstate Commerce Commission, nor did it charge that a sufficient number of the cars in the train were not equipped with power or train brakes, to enable the engineers to control the speed,

without requiring brakemen to use the hand brakes for that purpose; that it appeared from the pleadings that the trains in question were properly equipped, and that said equipment was used and operated by the engineer of the locomotive drawing each of said trains to control the speed thereof. (Tr. 20-22).

There is clearly involved the construction and application of the Constitution of the United States, the determination of a Federal question, and the application of a Federal statute. The amount in controversy exceeds the sum of one thousand dollars,—to-wit, twelve hundred dollars. The question here involved has not been decided by the Supreme Court of the United States. The decisions in the B. & O., Virginian and Great Northern cases (hereinafter cited) are inconsistent. In the interest of uniformity of decision there should be a final determination by the Supreme Court of the United States. The question to be determined is one of gravity and importance, involving as it does, under the contention of the government, the abolition entirely of men from the top of cars.

ARGUMENT

I.

THE BRAKEMEN WERE NOT REQUIRED TO USE THE HAND BRAKE TO CONTROL THE SPEED OF THE TRAIN, AND CONSEQUENTLY NO VIOLATION OF THE SAFETY APPLIANCE ACT ACT HAS BEEN SHOWN.

This case was before this court upon a writ of error from a judgment of dismissal entered after the sustaining of defendant's demurrer to the complaint. In

the decision of the majority of this court it was held that Congress had intended to dispense with the use of men on the top of the cars, and upon this theory the case was reversed. This is shown by the excerpts from the reports of the house committees and Interstate Commerce Reports. The phrases "dispense with the use of men on top of the cars," "so that men who are on the top of the cars will be taken off and thereby relieved from the danger of such position," "men will not be obliged to use the tops of the cars for braking," indicate the basis of the majority opinion.

U. S. vs. G. N. Ry. Co., 229 Fed. 929.

The act itself as construed in the majority opinion provides that the train should be sufficiently equipped to be run "without requiring brakemen to use the common hand brake."

It was not shown upon the trial, either that the trains in question were not equipped so that they could be run "without requiring brakemen to use the common hand brake," or that brakemen were required to be upon the top of cars.

The decision of the motion for judgment on the pleadings must rest upon the admission of the truth of all of the allegations of the answer and every reasonable intendment therefrom, and the allegations of the complaint can be held to be sustained only in so far as admitted by the answer. The complaint alleged, that in violation of the Safety Appliance Act, the defendant ran trains when the speed thereof "was con-

trolled by the brakemen using the common hand brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand brake to control the speed of said train, and when the speed of said train was not controlled by the power or train brakes used or operated by the engineer of the locomotive drawing such train." (Tr. p. 2).

The defendant, by its answer, admitted the movement of the trains and the interstate commerce character thereof. It then alleged: "Each engine upon each of said trains was equipped with power driving wheel brake and appliances for operating a train brake system, and that in each train not less than 85% of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes. Said defendant specifically denies that the Act of Congress mentioned in the complaint herein, as amended, was violated by the said defendant, and denies that said defendant is liable to the said plaintiff." (Tr. 17).

The sole effect of this answer, so far as it relates to the handbrake, is that the train was properly equipped with power driving wheel brakes and apliances, and at least 85% of the cars were equipped with power or train brakes; that these were used and operated by the engineers to control the speed of the trains "in connection with the hand brakes." The violation of the Safety Appliance Act was specifically denied, as was also any liability to the plaintiff on account of such

violation. The case is in a different situation than it was upon the prior hearing, for the reason that upon that hearing the sufficiency of the complaint and every reasonable intendment therefrom had to be admitted by the defendant,—with a stipulation of facts to be used to assist in the construction of the complaint. Here the allegations of the complaint are denied, and the stipulation which is embodied in the answer, must be construed most favorably to the defendant. The theory upon which the majority opinion rested upon the previous hearing was that Congress had intended to dispense with the use of brakemen upon the top of cars, and that brakemen were required to use the common hand brakes to control the speed of the train. The only allegation which can now be considered in that connection is that the power or train brakes "were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes." There is no admission here, either that brakemen were used upon the top of the cars or that brakemen were required to use the common hand brakes to control the speed of the train. For all that appears from the pleadings, the brakes may have been set before the cars were moved, in which event neither of the situations as outlined in the majority opinion, existed; that is, that brakemen were required to use the common hand brakes, or that they were upon top of cars using such brakes in connection with the control of the speed of the train. For this reason the judgment should be reversed, and the cause remanded, with instructions to enter a judgment for the defendant.

II.

THE SAFETY APPLIANCE ACT DID NOT PROHIBIT THE USE OF HAND BRAKES IN CONNECTION WITH THE CONTROL OF THE SPEED OF THE TRAIN.

The trains were equipped and the brakes used and operated, as required by the act, and there was no violation for which a penalty should be imposed. The original Safety Appliance Act declares:

> "That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brakes for that purpose."
>
> (Safety Appliance Act approved March 2, 1893, chap. 196, 27 St. at L., 531, as amended by Act of April 1, 1896, chap. 87, 29 St. at L., p. 85).

This act was subsequently amended by Section 2 of the Act of March 2, 1903, which provided:

> "That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train and all power-brake cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the object of said

> Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission, shall be subject to the like penalty as failure to comply with any requirement of this section."
>
> (Act of March 2, 1903, chap. 976, 32 St. at L., 943).

Pursuant to this amendment the Interstate Commerce Commission on the 6th day of June, 1910, promulgated the following order:

> "It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85% of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power brake cars in each such train which are associated together with the 85 per cent shall have their brakes so used and operated."

The Safety Appliance Act was further amended in 1910, as follows:

> "That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to-wit: All cars must be equipped with secure sill steps *and efficient hand brakes;* all cars

> requiring secure ladders and secure running boards, shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."
>
> (Sec. 2, chap. 160, Act of April 14, 1910, 36 St. at L., 298).

There is no claim by the government that the trains were not properly equipped, as required by the act and the order of the Interstate Commerce Commission, nor that the brakes were not used and operated by the engineers of the locomotives drawing the trains. The government's contention is that in controlling the speed of the train, brakemen were on top of the cars and used hand brakes for that purpose. The act of April 14, 1910, clearly contemplates the use of hand brakes, for the act provides "all cars must be equipped with secure sill steps and *efficient hand brakes.*" All that the statute requires is equipment and use and operation of 85% efficiency by the engineer. This is admitted by the government. The act of 1893 requiring a sufficient number of cars to be so equipped that the engineer can control the speed without requiring brakemen to use common hand brakes, was in conflict with the later act of Congress of 1903, providing that not less than 50% of the cars shall have their brakes used and operated by the engineer, and providing that

the Interstate Commerce Commission might increase this percentage. The statute cannot be enlarged by implication to extend it to cases not within its words and purport. There is nothing in the statute, either expressly or by implication, prohibiting the use of hand brakes in connection with the power brake system. The full percentage required by the statute and the order of the Interstate Commerce Commission were equipped. This court has no power to hold that a larger percentage of cars should have been equipped and operated than is required by the act and the order of the Commission, for to do so would assume the function devolved upon Congress by the Interstate Commerce Commission.

U. S. vs. G. N., 229 Fed. 932, (dissenting opinion of Judge Ross).

The indefiniteness of a "sufficient" number of cars was made certain by the act of 1903 in giving a percentage which should be equipped, used and operated. It is not left to the construction of an indefinite word to fix the obligation of the carrier. Authority was given the Commission to increase this percentage, which it did by various increase from 50% to 75% and then to 85%. If the Interstate Commerce Commission desires to make any change with reference to this percentage, it has authority under the act to do so. The Commission has exercised its prerogative in granting full hearings, and after such hearings fixing the standard upon which the railroads could operate, not sub-

jecting them to constant vacillation as to the correct number of cars to be equipped.

The pleadings do not show that the trains could not be controlled by the use of the air brake equipment, but on the contrary show that power or train brakes were used and operated to control the speed of the trains in connection with the hand brakes. The charge made in the complaint was that the speed was controlled by the brakemen using the common hand brake for that purpose, and when the speed was not controlled by the engineer of the locomotive. This is entirely negatived by the allegation of paragraph 3 of the answer, so that there is no offense even as claimed in the complaint, shown in this action. It was not a violation of the act to actually control the speed of the train by the use of hand brakes, or to use hand brakes to assist in the control of the speed; provided that at all times the train was so equipped that it could be controlled by the use of the air brakes with which it was equipped. The requirement of Congress of the equipment of cars with hand brakes evidences an intention on the part of Congress that such hand brakes be used. The only way that the prohibition against the use of hand brakes can be sustained is to read into the act words which are not there. There is no provision in the act requiring cars to be isolated before hand brakes are added. That there was no intention on the part of Congress to prohibit the use of hand brakes is shown by the absence of such a prohibition from every statute on the subject.

This act is unambiguous, and it is not necessary to resort to extraneous matters to gather the intention of the act. This can be gathered by the words themselves.

The act was passed "to promote the safety of employes and travelers upon railroads." (Title). With this purpose in view, the use of hand brakes to effectuate the purpose was not prohibited, and that it was the purpose to use the hand brakes is evident from the provision of the act requiring all cars to be equipped with them. Even with a full 100% equipment and use and operation of power or train brakes, the additional use of hand brakes might promote the safety of the trains, including the employes and travelers thereon. It was clearly not intended to take away this additional safety provision. The contention that the hand brakes can be used only when the cars are segregated is not reasonable. The act contains no such provision. It requires all cars to be equipped with efficient hand brakes, and it would be a clear violation of the act if the cars were quipped so that the hand brakes on cars could be used only when segregated from the train, and could not be used when associated in the train.

The claim that the words "without requiring brakemen to use the common hand brake" should be construed in the same way as the words, in another portion of the statute, "without the necessity of men going between the ends of the cars," is neither sound nor in accordance with the act. Proof of the fact that hand

brakes were used on the cars would not be evidence that the trains were not properly equipped with the requisite number of power brake cars. The test of compliance with reference to the coupling provision is whether men must go between the cars to couple or uncouple them. The act does not prohibit them from doing so. They must go in for other purposes. Proof of the fact that men go between the cars would not be proof that the couplings were not such as were required by the act. So here, proof that the hand brakes were used, would not be proof that the trains were not properly equipped with the power or train brakes.

U. S. vs. B. & O. Ry., 176 Fed. 114.
U. S. vs. B. & O Ry., 185 Fed. 46.

The coupler provision contains no requirement that any coupler shall be provided, other than the automatic coupler, while the train brake provision actually requires that the cars be equipped with hand brakes. If cars were required to be equipped with other couplers besides the automatic couplers it might reasonably be inferred that such couplers were intended to be used under some circumstances.

The requirement that hand brakes must be provided on all cars in interstate trains, shows that they are intended to be used on such trains under some circumstances.

"The statute should have a sensible construction, and its general purpose may be effected without adopting a view so harsh and onerous, primarily to the rail-

road company, but ultimately to the public, upon whom the burden of expense must finally rest. The purpose undoubtedly was to protect the lives, both of passengers and of employes, and also to safeguard the freight in transit."

U. S. vs. C. M. & St. P. Ry., 219 Fed. 1011.

Equipment only is the required thing, and not the proper manipulation of that equipment by the employes.

U. S. vs. Ill. Cent. Ry., 156 Fed. 192.
Missouri Pacific Ry. Co. vs. U. S., 211 Fed. 893.
Lyon vs. Charleston & W. C. Ry. Co., 56 S E. 18.
Thornton Employer's Liability and Safety Appliance Act, Sec. 191.

The Virginian case (U. S. vs. Virginian Ry., 223 Fed. 748) neither sustains nor controls the decision here, the contention of the government. In that case the trains were controlled solely by the use of hand brakes and the power brakes were not used at all. In any event, the court's holding was based on the position that in a penal statute a prohibition may be implied, which is not the law. Judge Ross in his dissenting opinion on the previous hearing of this case, clearly distinguished the Virginian case.

U. S. vs. G. N. Ry., 229 Fed. 933.

CONCLUSION

In order to sustain the government's contention in this case it is necessary to add to the Safety Appliance Act a qualifying clause "provided that 85% of the cars

so operated was sufficient to control the speed of the train." The grammatical construction of section 1 of the 1893 act demonstrates that the word "sufficient" is qualified by the words "without requiring brakemen to use the common hand brakes." Had it been intended to prohibit the use of hand brakes entirely in the control, a phrase would have been added "and the speed of such train shall not be controlled by the use of common hand brakes." No such prohibition is contained in the act, and the act relates entirely to an offense consisting of failure to "equip." There was for three reasons no inhibition against the use of hand brakes or brakemen using them; first, because the phrase as originally inserted was a criterion to determine the amount of proper equipment with reference to the word "sufficient;" second, this amount having been made definite by the amendment of 1903, the necessity for using it as a measure was gone; third, the prohibition was against the lack of equipment and not against the additional control.

The question in this case is not whether Congress should have prohibited the use of hand brakes, but whether Congress did do so. It involves the construction of plain words in a plain act,—an act which does not contain any such prohibition. To quote the words of the majority opinion upon the previous hearing, substituting the word "hand" for "power," "to say that trains shall be provided with hand brakes, and in the same breath to say that the carrier may refuse to use them, is to contradict the very purpose and terms of the

act." We have provided the train with power brakes; we have not refused to use them, but it is expressly admitted that we did use them; we are compelled to equip our train with hand brakes and we have not refused to use them, but did use them. Certainly this cannot be construed to be a contradiction of the purpose and terms of the act.

The government's position is not that we have failed to do that which Congress has required us to do, but that we have been guilty of a violation of the act in using all of the facilities which Congress requires us to use. It claims an implied prohibition in a penal statute, in which there is no prohibition, either express or implied, against using hand brakes as an additional precaution for safety.

Clearly, there was no offense, either under a strict or liberal construction of the act, and no penalty should be imposed, where even under the government's claim or the construction placed upon the act by the majority opinion, it was not shown that brakemen were upon the top of the cars, or that brakemen were required to use common hand brakes. The admitted facts show only that the power or train brakes were used and operated by the engineer of the locomotive drawing the trains, to control the speed, in connection with the hand brakes. This is contrary to the charge made in the complaint, and does not show an offense for which a penalty can be imposed under the act. The judgment

should be reversed, with instructions to enter a judgment for the defendant.

Respectfully submitted,

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